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Weldun International, Inc. and United Steelworkers of America, AFL-CIO-CLC. Cases 7-CA-34343 and 7-CA-34805

September 30, 2003

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On April 11, 2001, Administrative Law Judge Paul Bogas issued the attached Supplemental Decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order.

The compliance specification at issue in this case implements the remedy ordered in the Board's decision in *Weldun International*, 321 NLRB 733 (1996), *enfd.* in relevant part, *NLRB v. Weldun International*, 165 F.3d 28 (6th Cir. 1998). There, the Board found that the Respondent violated the Act by, *inter alia*, discriminatorily terminating 29 employees, telling employees that the terminated employees would not be reinstated because of the Union and the charges filed by the Union, and impliedly threatening employees that the plant would be closed. In reaching its decision, the Board rejected the Respondent's contentions, *inter alia*, that the layoffs, including those in the machine department, were justified by valid business reasons. The Board also found that private settlement agreements entered into by some employees following their unlawful layoffs did not preclude a reinstatement order or a backpay remedy here, but could potentially limit the amount of backpay due the discriminatees. As the judge correctly found, matters decided in the Board's decision underlying this compliance proceeding, and enforced by a United States court of appeals, are

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

settled matters and may not be relitigated here. *Transport Service Co.*, 314 NLRB 458, 459 (1994).

The chief issue before us concerns the backpay formula. We adopt the judge's finding that the average earnings formula used in the backpay specification is fair, reasonable, and most accurately approximates the earnings the discriminatees would have realized had they not been unlawfully discharged.² This formula calculates backpay based on the prediscrimination hours worked by the discriminatees. The Respondent contends that overtime pay should have been calculated based on the actual amount of overtime worked by a comparable group of employees during the backpay period, and in consideration of the reduced demand for work traditionally performed by the unit employees and the length of time covered by the backpay period. According to the Respondent, such a formula would be more reasonable, fair, and accurate than the formula used in the compliance specification, because it would properly reflect decreases in business over the backpay period attributable to staff and overtime reductions in the assembly and machine departments. We find no merit in these arguments.

As noted, in the Board's underlying decision, enforced by a United States Court of Appeals, the Board found unlawful the restructuring of the machine department and layoff of employees. The Board further found that the Respondent significantly increased its use of subcontractors and temporary employees to perform unit work following the unlawful layoffs, a fact inconsistent with the claimed decrease in unit work.³ The Board found "a

² In agreement with the judge, we also find that the backpay entitlement of employees Jim Doud, Robert Dunning, Delmar Kirksey, Kurd Lindhorst, and Jerry Thompsen (who died during the backpay period) has been established in the underlying Board and court decisions, and that the only issue remaining at the compliance stage of these proceedings is the effect of the severance amounts on the employees' backpay awards. Accordingly, we adopt the judge's approval of the revised compliance schedules for these employees, which reduce gross backpay by the amounts of the severance payments.

We find no merit in the Respondent's exceptions to the judge's finding that discriminatees Rex Jackson and Meryl Zion did not sustain willful losses of earnings disqualifying them from receiving backpay. Accordingly, we adopt the judge's findings, conclusions, and recommended remedy for these employees.

Chairman Battista agrees that the issues of the settlement agreements and James Whitehead's status as a discriminatee are *res judicata*. He notes that he did not participate in the underlying unfair labor practice case and, thus, takes no position regarding the validity of that decision.

³ The Respondent contends that it hired fewer employees than it laid off during the backpay period and, in effect, that this fact shows that it would have laid off some employees for lawful reasons. Because the restructuring of operations and layoff were unlawful and tainted subsequent employment decisions, it is impossible to know whether this contention is valid. We construe any such uncertainties against the Respondent. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), *enfd.* 48 F.3d 1232 (10th Cir. 1995).

complete lack of evidence that the Respondent was even considering such drastic action before it became aware of the union campaign.” In affirming the Board’s decision, the court of appeals emphasized the absence of evidence to support the Respondent’s claim of a decrease in business unrelated to the unlawful restructuring and layoff. The Respondent may not relitigate these settled matters in this compliance proceeding.

Moreover, we agree with the judge’s finding in this proceeding that, “even if the Respondent concluded during the backpay period that it was cost effective to increase its use of subcontractors, that conclusion was dependent on the prior decisions to unlawfully layoff employees and to restructure to reduce the amount of work performed.” The Respondent has not shown that it later would have lawfully laid off employees, notwithstanding any previous unlawful layoffs.⁴ The Board does not reduce a backpay award based on a reduction in work that is, itself, the result of antiunion animus. *Coronet Foods, Inc.*, 322 NLRB 837, 840 (1997), *enfd.* in part 158 F.3d 782(1998).

The Respondent also contends that the backpay formula is flawed in that it does not take into account the long backpay period (approximately 5 years) and, thus, the uncertainty of earnings so far into the future. We find no merit in this contention for substantially the same reasons discussed above. Further, we find distinguishable the cases cited by the Respondent for this proposition. In *Woodline Motor Freight*, 305 NLRB 6 (1991), *enfd.* 972 F.2d 222 (8th Cir. 1992), the Board declined to use a backpay formula based on pre-unfair-labor-practice earnings because deregulation of the trucking industry, contemporaneous with the lengthy backpay period, legitimately rendered unreliable the use of such a formula. Here, the Respondent has advanced no such legitimate justification. The Respondent’s reliance on *Boland Marine and Mfg. Co.*, 280 NLRB 454, 460–461 (1986), is similarly misplaced. There, the employer’s workforce also declined for a valid reason, the completion of several major projects.

Accordingly, we find the Respondent’s exceptions to the backpay formula used in the compliance specification lack merit.⁵

⁴ Accordingly, we need not further consider the Respondent’s contention, properly rejected by the judge, that backpay should be calculated by dividing the number of hours actually worked during the backpay period by the aggregate number of employees working plus discriminatees.

⁵ In his decision, rejecting the Respondent’s argument that the overtime earnings of comparable employees during the backpay period should be used as the measure of damages, the administrative law judge commented:

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Weldun International, Inc., Bridgman, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Peter C. Schaumber,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

Thomas W. Doerr, Esq., for the General Counsel.

Michael A. Taylor, Esq. (Verner, Lipfert, Bernhard, McPherson & Hand), Washington, D.C., for the Respondent.

Frederick A. Stuart, Esq., Broadview, Illinois, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. On September 16, 1998, the U.S. Court of Appeals for the Sixth Circuit enforced that portion of the Order of the National Labor Relations Board (the Board) that directed Weldun International, Inc. (the Respondent) to provide make-whole relief to 29 individuals who the Respondent unlawfully laid off in response to a unionizing effort. The Acting Director of Region 7 of the Board issued a compliance specification and notice of hearing on May 24, 2000, which stated that the Respondent owed backpay and other monetary relief totaling \$1,145,152.24 plus interest to the 29 individuals. Through various amendments to the backpay schedules in the specification, the preinterest amount claimed has been reduced to \$948,731.69. The Respondent has filed an answer to the compliance specification disputing the backpay formula used by the Acting Regional Director and raising mul-

Moreover, even if one assumes that some formula based on the earnings of comparable employees could be more accurate in this case than the formula used in the compliance specification, the precise method chosen by the Respondent has been repudiated by the Board and tends to overstate any decline in the hours the discriminatees would have worked.

Member Schaumber agrees with the judge’s decision rejecting the comparable approach for the reasons expressed in his decision. He disagrees, however, with the above comment of the judge to the extent he may be suggesting that the Board will focus on the precise method chosen by a Respondent even if a modification of the Respondent’s method would produce a more accurate formula. However, in this case, for the reasons given by the judge, no modification of the Respondent’s method would have produced a more accurate formula.

multiple other objections to the amounts stated in the compliance specification. With respect to the formula, the Respondent's primary contention is that the Board should not have estimated the discriminatees' lost overtime earnings during the backpay period based on the average earnings of the discriminatees during a 1-year period prior to the unlawful layoffs, but rather should have used the hours and earnings of comparable employees actually working during the backpay period. The Respondent argues that the company's business was in decline and that the discriminatees, if retained, would have worked fewer overtime hours during the backpay period than they did during the previolation period relied on in the compliance specification. The General Counsel counters that the approach used to create the compliance specification is more accurate because, inter alia, the Respondent's calculations do not take into account the Respondent's use of outside contractors and temporary employees during the backpay period to perform work previously done by the discriminatees, and because any decline in the Respondent's business during the backpay period was tainted by the Respondent's unfair labor practices. Among the Respondent's other objections to the compliance specification are: that the backpay period for discriminatees from the Respondent's machine department should close at the end of 1993, rather than in October of 1998; that the Region improperly seeks backpay for claimants who signed private settlement agreements; and that a number of claimants failed to mitigate their losses. According to the Respondent, the correct figure for backpay and other monetary relief is \$391,136.83.

The compliance hearing in this case was held in Dowagiac, Michigan on October 10–13 and 24–25, 2000. On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

A. Background

The Respondent is a corporation that, until October of 1998, had a flexible assembly system (FAS) operation in Bridgman, Michigan. It is a wholly owned subsidiary of Robert Bosch Corporation, an Illinois Corporation, owned by Robert Bosch, a German corporation. The machine and assembly departments at issue in the underlying unfair labor practices proceeding were located at the Respondent's Bridgman facility and were part of the Respondent's FAS division. On February 22, 1993, the United Steelworkers of America, AFL–CIO, CLC (the Union) made a written request that the Respondent recognize it as the exclusive collective-bargaining representative for a unit of employees in the FAS division. As of that request, or shortly thereafter, 70 members of the prospective unit of approximately 140 employees had signed cards authorizing the Union to act as their representative. On March 11 and 12, 1993, the Respondent carried out an unprecedented permanent layoff of 29 of its employees. These laid off employees represented over 20 percent of the employees in the prospective unit and the layoffs occurred

just days before a representation hearing was to be held. During the early part of 1993, prior to the layoffs, the Respondent's backlog of orders was somewhat smaller than it had been during the same period of the prior three years. However, a number of the discriminatees testified credibly that they had not noticed a significant decrease in the number of hours being worked as compared to the same timeframe during 1992.

On the day that the discriminatees were permanently laid off, the Respondent presented some or all of them with a letter and release offering enhanced severance benefits in exchange for the discriminatees' agreements to release the Respondent "from any and all claims of any nature whatsoever" relating to their employment, including any claims under the National Labor Relations Act (the Act). The discriminatees were given 21 days to review this proposal and an additional seven days to consider revoking it after signing. A number of the employees presented with this proposal consulted with attorneys, and five of the discriminatees—Jim Doud, Robert Dunning, Delmar Kirksey, Kurt Lindhorst and Jerry Thompson—executed the releases and received enhanced severance benefits. At the time that they executed the releases none of these employees was aware that the Union had filed, or planned to file, a charge based on the layoffs, and none had consulted with anyone associated with the Union about the matter.

After the unlawful layoffs the union activities continued, and eight more individuals signed union authorization cards, bringing the total to 78. The Respondent's opposition to the union campaign also continued. On June 11, 1993, the Respondent's president and CEO, Frank Schoenwitz, called employees together for "communication" meetings, at which he told them that the FAS operation would be "doomed" if the employees selected the Union as their collective bargaining representative. In April of 1993, two of the Respondent's officials, Jerry Scroggins and Russel Hansen, told employees that the discriminatees could not be recalled because of the Union and the unfair labor practice charges filed by the Union. In June of 1993 another company official, Marlin Phillips, had conversations with employees in which he blamed the Union for the layoffs.

By letters dated October 6, 1994, the Respondent informed discriminatees that the Company had a limited number of openings for skilled employees and invited them to contact the Respondent's human resources office. Some employees were verbally offered, or informed about, available positions. One discriminatee, Delmar Kirksey, accepted a position and was re-employed by the company doing the same type of work as he had before the layoff. Although he was reinstated at the same hourly wage he was earning before the layoff, Kirksey's vacation time, which was based on seniority, was only restored at 75percent of its prelayoff level. Other employees declined verbal offers of employment for various reasons. One such employee was Rex Jackson, who received the letter about openings and subsequently visited the Respondent's plant to seek employment. He was told he could have a job as a janitor on the second shift making seven dollars per hour. At the time of his layoff Jackson was a bench helper on the first shift making

¹ I also take judicial notice of the findings that were upheld in the underlying unfair labor practices case.

over eight dollars per hour.² Jackson turned down the offer. Discriminatee Timothy James Hunt, Sr., was a toolmaker or lead man toolmaker in the assembly department when he was unlawfully laid off, and he was offered reemployment in October of 1994 to a job in the machine department. He was told that if he accepted reinstatement the company would restore none of his seniority for the first year, and that afterwards the company would restore 75 percent of his prelayoff seniority. The wage offered to him was the same as he was earning at the time of the illegal layoff, but less than he would have been receiving in October of 1994 if he had never been laid off. Hunt turned down the position because he believed that the Respondent's failure to restore his seniority would put him at risk for layoff in the future.³ Discriminatee David Michael Sinner was a toolmaker in the machine department at the time of his unlawful layoff in 1993, and in October of 1994 the Respondent offered him reemployment as a general machinist operating a "bridgeport" machine. The general machinist/bridgeport operator position involved more limited duties and tasks than the toolmaker position. Dick Koziel, the vice president in charge of the machine department, informed Sinner that his seniority would not be restored for 12 to 18

² I credit Jackson's testimony regarding his position, shift, and wage level, at the time of the unlawful layoff, and the position shift and wage level, the Respondent offered him in October of 1994. I base this on his demeanor, which was calm and certain, and on the totality of the evidence. I do not credit the testimony of Laurence Brown, the Respondent's Human Resources Director in 1994, who testified that Jackson was a janitor at the time of his layoff. Brown did not start with the Respondent until August of 1993, and conceded that he had no first-hand knowledge of what Jackson was doing at the time of the layoff in March of 1993. Moreover, the payroll excerpts submitted by the Respondent show that Jackson was classified as a "deburrer," not a "janitor" at the time he was laid-off. R. Exh. 14. I found Brown's assertion that the deburrer classification was consistent with Jackson being a janitor unconvincing on its face and also in light of the evidence that another employee, Victor J. Jackson, was explicitly classified as a janitor in the payroll excerpts. Brown testified that the pay offered Jackson "would have been no less than the same amount he was making" at the layoff, but he did not remember the precise pay offered to Jackson and his vague testimony was outweighed by Jackson's more confident and detailed recollection. Brown did not recall what shift Jackson worked on prior to the layoff, or on what shift Jackson was offered employment. Jackson's claim that the job he was offered was on a different shift than he was working prior to the layoff was un rebutted.

³ I found Hunt's testimony regarding the 1994 job opening credible based on his demeanor and the totality of the evidence. Brown's contrary testimony was vague and uncertain, and I have not credited it. Brown claimed that the position offered to Hunt would have been equivalent to the one Hunt held before the 1993 layoff, but Brown could not recall the position that was offered in 1994, and was not working for the Respondent at the time of the Hunt's 1993 layoff. Brown testified that his recollection was that the reemployment offers in 1994 would have included the restoration of the individual's full seniority, but he conceded that his recollection was "fuzzy" on this score. I do not credit his fuzzy recollection regarding the restoration of seniority. That recollection was contrary to the testimony not only of Hunt, but also of Sinner and Kirksey.

months. Sinner did not accept the position.⁴ Another discriminatee, Meryl Ray Zion, telephoned the Respondent in response to the October 6, 1994, letter, but the jobs that were described to him all required skills that Zion believed he did not possess. Zion did not follow-up further and received no job offer.

During the years following the mass layoff there were hirings and terminations in the Respondent's FAS division, however, the staff level never reached where it had been prior to March of 1993.

B. Prior Unfair Labor Practices Decisions

1. The Decision of Administrative Law Judge Batson

The Union filed charges against the Respondent on March 15, 1993, and July 23, 1993, alleging violations of Section 8(a)(1), (3) and (5) of the Act. On December 5, 1994, Administrative Law Judge Robert C. Batson issued a decision in which he held that the Respondent had committed numerous unfair labor practices in violation of the Act. Judge Batson concluded that after the Respondent became aware of the unionizing effort in February of 1993, it unlawfully opposed that effort by: discriminatorily laying off 29 employees; telling employees that the terminations were related to the Union activity; telling employees that the laid off employees could not be recalled because of the Union and the unfair labor practices charges filed by the Union; coercively interrogating its employees about union and protected activities; creating the impression that union activities were under surveillance; threatening employees with loss of benefits if they selected the Union to represent them; impliedly threatening employees with plant closure if they selected the Union; and refusing to recognize and bargain collectively with the Union. Judge Batson also found that the unit sought by the Union was appropriate for purposes of collective bargaining and that the Union had represented a majority of the employees in the unit at an appropriate time. Commenting on the Respondent's behavior, Judge Batson stated that "[d]uring almost 30 years working in the field of labor relations," he had "seldom encountered a case in which the employer responded more swiftly, blatantly, viciously, and indefensibly to the advent of union activities."

In his decision, Judge Batson specifically rejected the Respondent's contention that a downturn in the company's economic circumstances explained the decision to permanently lay off the 29 employees. Judge Batson noted that shortly before the layoffs the Respondent's president and CEO, Frank Schoenwitz, publicly announced that 1992 was the most successful year in the history of the company, and that the prospects for 1993 were bright although economic signals were mixed. Schoenwitz stated that the company expected steady growth in employment in 1993. In Schoenwitz's monthly reports to corporate headquarters for January and February of 1993, he gave no hint that a massive downsizing was on the

⁴ I found Sinner a credible witness based on his demeanor and the totality of the evidence and have credited his testimony to the extent consistent with the facts found above. In particular, I credit his testimony that he was told that his seniority would not be restored for 12 to 18 months. I discredit Brown's testimony that restoration of prelayoff seniority was part of the 1994 reemployment offers. See *supra* fn. 3.

horizon. The February report was actually issued on March 9th, just two days before the mass layoffs began. Judge Batson observed that other actions by the Respondent were also inconsistent with the Respondent's claim that a reduction in the amount of available work explained the layoffs. He observed that after the layoffs the Respondent increased its use of sub-contractors significantly and had brought in eight outside electricians to perform work that was previously done by the laid off employees. Judge Batson conceded that the backlog of orders was down at the beginning of 1993, but noted that the reports for January, February and March of earlier years showed that the backlog of orders generally went down during the first three months of the year and then rebounded.

The Respondent was found to have committed violations of the Act subsequent to the unlawful layoffs (and, therefore, during the backpay period at issue in this compliance proceeding). Most significantly, Judge Batson found that at "communication" meetings with employees on June 11, 1993, Schoenwitz impliedly threatened that the plant would be closed if the employees selected the Union as their collective bargaining representative. In addition, Judge Batson concluded that in April of 1993 two of the Respondent's officials violated section 8(a)(1) by telling current employees that the discriminatees could not be recalled because of the Union and the Union's unfair labor practice charges. Judge Batson found that during a conversation with employees in June of 1993, another official violated section 8(a)(1) by blaming the Union for the layoffs.

The remedy proposed by Judge Batson included reinstatement and make-whole relief for all 29 of the discriminatees, and an order directing the Respondent to recognize and bargain in good faith with the Union. According to Judge Batson, the latter remedy was warranted because the Respondent's "outrageous" and "pervasive" violations had "made the likelihood of a fair election remote if not impossible."

2. The Decision of the Board

The Respondent filed exceptions to Judge Batson's decision. The Board affirmed Judge Batson's conclusions that the Respondent had violated the Act by, inter alia, discriminatorily terminating 29 employees, telling employees that the terminated employees would not be reinstated because of the Union and the charges filed by the Union, and impliedly threatening employees that the plant would be closed if employees selected the Union. *Weldun International*, 321 NLRB 733 (1996). The Board reversed Judge Batson's conclusion that the Respondent had violated the Act by threatening one employee with unspecified reprisals and loss of benefits.

The Board stated that the Respondent had demonstrated a willingness to "keep the Union out by any means necessary." Like Judge Batson, the Board rejected the Respondent's contention that the permanent layoffs of the 29 employees were justified by business reasons. In particular, the Board considered and rejected the Respondent's claim that the terminations of 18 employees from the Respondent's machine department were based on a business decision to restructure its machining operation to support the core business only—i.e., a business decision to stop performing jobs for outside customers and do machining work exclusively to meet the needs of companies

related to the Respondent's parent corporation. The Board stated that there was a "complete lack of evidence that the Respondent was even considering [the layoffs] before it became aware of the union campaign." The Board did acknowledge that "the demand for machining was down due to a shift to less-heavily machined products and a decline in the general tool business," and that the backlog of orders was lower in early 1993 than it had been during the same periods of the previous three years. However, the Board did not state that the size of either of these changes was substantial enough to motivate any layoffs at all. Rather, the Board stated that the evidence showed that the Respondent used "the mass layoff to intimidate its employees and to discourage them from voting for union representation." The Board also noted that the Respondent's decision to "restructure" the machining operation coincided with the Union's filing of the election petition.

The Board also considered the Respondent's contention that no remedies should be granted to five discriminatees (Doud, Dunning, Kirksey, Lindhorst, and Thompson) who had executed settlement agreements and releases after being permanently laid off. The Board rejected this contention and ordered the Respondent to provide offers of full reinstatement and make-whole relief to these five discriminatees. 321 NLRB at 737. The Board stated that at the compliance stage the inquiry would be "limited" to consideration "of the effect that the amounts received shall have on these employees' backpay awards." 321 NLRB at 734 fn. 6. The settlement agreements in this case were, the Board explained, "distinguishable from those at issue in *Hughes Christensen Co.*, 317 NLRB 633, (1995), [enf. denied 101 F.3d 28 (5th Cir. 1996)]"—a case in which settlements were held to preclude any relief whatsoever to claimants. The Board noted that in *Hughes Christensen*, the former employees who signed the agreements had been members of the union committee negotiating over a plant relocation and downsizing, and that at the time the settlements were executed the unfair labor practice charge had been dismissed by the Board as lacking in merit.

3. The Decision of the Court of Appeals

The Respondent appealed the Board's decision to the U.S. Court of Appeals for the Sixth Circuit, arguing that the March 1993 layoffs did not violate the Act, that Schoenwitz had not unlawfully threatened employees with plant closure, and that the issuance of the remedial bargaining order was improper. In its decision, issued on September 16, 1998, the Court of Appeals upheld the Board's determinations that, inter alia, the 1993 layoffs violated the Act and that Schoenwitz had threatened employees with plant closure in violation of the Act. See GC Exh. 1(b). The Court of Appeals granted enforcement of the Board's order except for the portion requiring the Respondent to recognize and bargain with the Union.

Regarding the Respondent's defense that the mass layoff was due to business reasons, the Court stated that "[q]uite simply, no contemporaneous evidence in the record corroborates [the Respondent's] claim that the layoffs were the result of alarm at an unprecedented downturn in business." The Court also found that substantial evidence supported the Board's finding that Schoenwitz had told employees that the FAS division would be

“doomed” if the Union were selected, and that Schoenwitz’s statement constituted an unlawful threat under the circumstances. Regarding its decision that a bargaining order was not appropriate, the Court stated that the Respondent’s “conduct has been inexcusable,” but that the Board failed to demonstrate that other “remedial measures [were] insufficient to ensure a fair election.” Judge Cole dissented from the portion of the Court’s decision denying enforcement of the bargaining order, and argued that such a remedy was appropriate given the Respondent’s conduct.

4. Activities Subsequent to the Court of Appeals’ Decision

In 1998, the Respondent sold its FAS operation in Bridgman to Precision Control (Precision). Precision assumed control of the facility in late October or early November of 1998, not as an ongoing concern but as assets. Prior to when Precision took over the facility, the Respondent sent letters, dated October 2, 1998, to the 29 discriminatees offering them unconditional reinstatement. The letter told the discriminatees that the deadline for responding was October 12, 1998, and that they had to report for work no later than October 26, 1998. The deadline for responding may have been extended to October 16th. Almost all of the discriminatees accepted the offers. The only discriminatee who the record establishes did not accept an offer of reinstatement was Jerry Thompson, who had died. The employees reinstated in 1998 worked for just a few days before the facility was turned over to Precision and operations ceased on about October 30, 1998. As a result of the brief period of reinstatement the discriminatees qualified for a severance plan, adopted by the Respondent’s parent corporation after the 1993 layoffs, which applied to employees who lost their jobs as a result of plant closure and job elimination.⁵

Analysis and Discussion

The finding of an unfair labor practice is presumptive proof that some backpay is owed. *Beverly California Corp.*, 329 NLRB 977, 978 (1999). The General Counsel’s burden in backpay cases is to show the amount of gross backpay due each claimant. *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993); *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962). The burden then shifts to the Respondent to establish facts that negate or mitigate its liability. *Id.* The backpay claimant should

⁵ The Respondent devotes a portion of its brief to arguing that the Regional Office did not give fair consideration to the Respondents’ contentions about a proper remedy before the Regional Director issued the compliance specification. RR. Br. at 4–7. The General Counsel counters that despite the Regional Office’s repeated requests the “Respondent failed to produce any records to support its claims.” GC Br. at 4. I make no finding as to which side gets the better of this finger-pointing skirmish. My determination about the proper remedy in this case is based on all the evidence of record, including any that was provided by the Respondent for the first time at the hearing, not on any conclusion about who was to blame for information not being available during the compliance phase in the Regional Office.

Similarly, the Respondent complains that the Regional Office did not issue the compliance specification in a timely fashion. Even if the Regional Office was responsible for delays, such delays are not a factor to be considered in this proceeding. *Unitog Rental Services*, 318 NLRB 880, 884–885 (1995), *affd.* 105 F.3d 651 (5th Cir. 1996).

receive the benefit of any doubt rather than the respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), *enfd.* 48 F.3d 1232 (10th Cir. 1995).

The Respondent raises multiple objections to the amounts stated in the compliance specification. A number of these are general objections that apply to a group of the discriminatees. Other objections are directed to specific discriminatees and the validity of these objections depends on the facts relating to the particular discriminatee involved. I will first consider the general objections before turning to those involving individual claimants.

I. THE BACKPAY FORMULA

The backpay formula used in the compliance specification, and advocated by the General Counsel, estimates what the discriminatees would have earned during the backpay period by projecting from the average earnings each discriminatee received from the Respondent during 1992, the last full calendar year of their employment with the Respondent. More specifically, to arrive at gross backpay figures, the Acting Regional Director divided the 1992 earnings of each discriminatee by the number of weeks that the discriminatee was employed during that year to arrive at his or her average weekly wages. Then the average weekly wages were divided by the discriminatee’s hourly wage rate to determine his or her average weekly hours. The average weekly hours figure was then multiplied by the wage rate that the discriminatee would have earned at various stages during the backpay period to determine the discriminatee’s gross backpay.⁶

The Respondent has chosen not to dispute the calculation of each discriminatee’s nonovertime hours that is implicit in the General Counsel’s schedules, and which was based on the nonovertime hours worked by the discriminatees themselves during 1992. Tr. 300–301; Respondent’s Brief at 20.⁷ However, the Respondent advocates a different approach with respect to estimating the overtime hours the discriminatees would have worked for each year of the backpay period. The Respondent’s method is based on the overtime hours worked during the backpay period by employees in what the Respondent identifies as comparable positions. The Respondent’s method, as described in the testimony of Frederick A. Stuart (Robert Bosch Corporation’s Chief Counsel for Labor Relations and Employment) is labyrinthine and I will recount only its major features. The Respondent first determines the total number of overtime

⁶ Since the 1992 earnings figure includes earnings derived from both regular/nonovertime hours and overtime hours, this approach accounts for both types of hours although it does not distinguish one from the other in the average weekly hours figure. Essentially what happens under this approach is that each overtime hour is converted into one and a half regular hours, since the overtime hours were compensated at time and a half. Then the average weekly hours figure is multiplied by the hourly rate for regular/nonovertime hours.

⁷ Since the General Counsel’s method does not actually distinguish between overtime and nonovertime hours, the Respondent uses a series of calculations to extract out that portion of the General Counsel’s backpay specification that is attributable to the nonovertime hours of each discriminatee.

hours that were worked collectively during each year of the backpay period by a group of employees who held positions comparable to those that one or more of the discriminatees held before the layoffs. Those total collective hours are then divided among both the employees working in the selected positions during that year and the discriminatees who had been unlawfully laid off from the same or comparable positions. That figure is then divided by 52 weeks to generate what the Respondent characterizes as the average number of overtime hours per employee, per week, during that year for employees in that classification/comparator group. The Respondent then uses those figures for average weekly overtime hours, along with the applicable wage rate, to arrive at a figure representing the Respondent's view of how much each discriminatee would have earned in overtime pay during each year of the backpay period had he or she continued to be employed. In order to arrive at a total gross backpay figure for each discriminatee, the Respondent adds the average earnings from nonovertime hours, see *supra* footnote 7, to the earnings for overtime hours. The grand total backpay figure generated for all the discriminatees under the Respondent's method is, according to Stuart's testimony, approximately \$300,000 to \$400,000 lower than the figure generated using the method employed in the compliance specification. Tr. 312-313.

"In solving many of the problems which arise in backpay cases, the Board occasionally is required to adopt formulas which result in backpay determinations that are close approximations because no better basis exists for determining the exact amount due." *The Buncher Company*, 164 NLRB 340, 341 (1967), *enfd.* 405 F.2d 787 (3d Cir. 1968), *cert. denied* 396 U.S. 828 (1969). Any formula that approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary given the circumstances. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), *enfd. sub nom. Angle v. NLRB*, 683 F.2d 1296 (10th Cir. 1982). The Board's discretion is broad in its selection of a backpay formula that is reasonably designed to produce approximations of the backpay due. *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304 (2d Cir. 1977); *NLRB v. Carpenters Local 180*, 433 F.2d 934, 935 (9th Cir. 1970); see also *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (Board has broad discretion in fashioning a remedy). When the General Counsel and the Respondent offer alternative formulas, the administrative law judge must determine the most accurate formula. *Regional Import and Export Trucking Co., Inc.*, 318 NLRB 816, 820 (1995); *Woodline Motor Freight, Inc.*, 305 NLRB 6 n. 4 (1991), *enfd.* 972 F.2d 222 (8th Cir. 1992). Where there are uncertainties, or ambiguities, they are to be resolved in favor of the wronged party, rather than the wrongdoer, *La Favorita, Inc.*, 313 NLRB at 903; *WHLI Radio*, 233 NLRB 326, 330-331 (1977).

A backpay formula that, like the one used in the compliance specification, projects the discriminatees' earnings during the backpay period based on the discriminatees' prediscrimination earnings is "both conventional and noncontroversial." *East Wind Enterprises*, 268 NLRB 655, 656 (1984). The use of this type of formula should not be departed from absent special circumstances. *Chef Nathan Sez Eat Here*, 201 NLRB 343, 345

(1973). The Respondent contends that there are special circumstances warranting departure in this case because of the long backpay period and a decline in earnings for hourly employees in the assembly and machine departments. The Respondent notes that the Board's Compliance Casehandling Manual, while listing the past average earnings approach as one of the standard methods for calculating backpay, also states that such a formula may not be appropriate when the backpay period is long since the conditions that existed prior to the unlawful action may have changed.⁸ The Respondent cites a number of decisions in which the Board has approved the use of calculations based on the hours worked by comparable employees during the backpay period to assess the amount due to employees. See, e.g., *Midwest Hanger Co.*, 221 NLRB 911, 915 (1975), *enfd.* in relevant part, 550 F.2d 1101 (8th Cir. 1977), *cert. denied*, 434 U.S. 830 (1977); *International Trailer Co.*, 150 NLRB 1205, 1208-1211 (1965); *East Texas Steel Castings Co.*, 116 NLRB 1336, 1337 (1957), *enfd.* 265 284 (5th Cir. 1958).⁹

After carefully considering the matter I have concluded that the gross backpay formula used in the backpay specification is reasonable and more accurately approximates what the Respondent would have paid the discriminatees during the backpay period than does the formula forwarded by the Respondent. This is not to say that the Respondent's arguments do not have some facial appeal. Certainly, if an employer shows that it suffered a decline in its business that was unrelated to antiunion animus, and which reduced the amount of work the discriminatees would have performed during the backpay period, then a formula that accounts for that decline might well be more accurate than a formula based on the discriminatees' own average earnings prior to the backpay period. In this case, however, the evidence does not establish either that there was a necessary decline in the amount of work that would have been available during the backpay period to be performed by the discriminatees, or that any such decline was unrelated to its proven antiunion animus. Moreover, even if one assumes that some formula based on the earnings of comparable employees could be more accurate in this case than the formula used in the compliance specification, the precise method chosen by the Respondent has been repudiated by the Board and tends to overstate any decline in the hours that the discriminatees would have worked.

⁸ It is well settled that the provisions of the Casehandling Manual are not binding rules and are merely intended to provide guidance. See *Belle of Sioux City*, 333 NLRB 98 (2001), *Queen Kaptolani Hotel*, 316 NLRB 655, 656 fn. 5 (1995). The Manual itself specifically provides that its provisions are not "a form of authority binding . . . on the Board." See National Labor Relations Board Casehandling Manual, Purpose of Manual.

⁹ In *Midwest Hanger*, *International Trailer*, and *East Texas Steel Castings*, it was the Regional Director and/or the General Counsel (not the wrongdoer/respondent) who advocated use of a formula based on comparable employees, and in both *Midwest Hanger* and *International Trailer* the Board explicitly relied on the fact that the Regional Director and General Counsel had broad discretion to choose a backpay formula reasonably designed to approximate the backpay due. *Midwest Hanger*, 221 NLRB at 915, *International Trailer Co.*, 150 NLRB at 1207.

The Respondent supports its contention that the work available to be performed by the discriminatees declined during the backpay period by introducing excerpts from payroll records that show the overtime hours and earnings for permanent employees during the backpay period. It also introduced summary charts showing that, although there were new hires during the backpay period, the company's staff of permanent employees in the machine and assembly departments never again reached the levels from prior to the unlawful layoffs. The main problem with this is that in the underlying unfair labor practices case it was found that the Respondent significantly increased its use of subcontractors after the unlawful March layoffs. 321 NLRB at 750. For example, after the layoffs the Respondent brought in eight outside electricians to perform work in the assembly department that had previously been performed by the laid off workers. *Id.* Management attorney and witness Frederick A. Stuart conceded when explaining the Respondent's formula that his calculations did not account for work done by subcontractors and temporary workers during the backpay period. Tr. 339. Nor did the Respondent offer any comparison of the use of subcontractors prior to the backpay period with their increased use during the backpay period. Without such a comparison one cannot conclude that the amount of overtime that would have been available to be performed by the discriminatees had they not been unlawfully terminated was actually less than it was during the period prior to the layoffs. See *Coronet Foods, Inc.*, 322 NLRB 837, 840 (1977) (the Board concludes that a backpay formula based on a projection of the claimants' pretermination earnings is more accurate than a formula based on earnings of replacement workers where the lower level of earnings of replacement workers was a result of the Respondent's discriminatorily motivated subcontracting of work previously done by the claimants), *enfd.* in relevant part 158 F.3d 782 (4th Cir. 1998).

In addition, I believe that the evidence casts real doubt on the Respondent's assumption that any decline in the amount of work available would have occurred absent the Respondent's unlawful actions. Backpay will not be reduced based on a reduction in work that is itself the result of antiunion animus. *Coronet Foods, Inc.*, 322 NLRB at 840. In the underlying unfair labor practices decision, the Board stated that the Respondent did not decide to restructure its machine department in such a way as to reduce work at the plant until "around the very time that the Union filed its [representation] petition." The Board found that the layoffs in the machine department, which the Respondent had claimed were related to the restructuring and resulting reduction in work, were really designed "to intimidate its employees and to discourage them from voting for union representation." There was no credible evidence "indicating that the Respondent was planning a layoff of any kind before the Union filed its petition." 321 NLRB at 734. The Board stated that the Respondent had demonstrated a willingness "to keep the Union out by any means necessary." 321 NLRB at 736. Although the Board does not say it in so many words, the implication is clear—the Respondent had taken actions to reduce the amount of work being performed in-house as part of its effort to keep the Union out. Indeed, it is hard to imagine that the Respondent could have laid off approximately

20percent of the workforce in the assembly and machine departments for discriminatory reasons without also reducing the amount of work being performed in those departments. Under the circumstances, I believe that any reduction in the work being performed by comparable employees during the backpay period is tainted by the Respondent's unfair labor practices, and that there is substantial uncertainty as to whether such reductions would have occurred in the absence of the unlawful anti-union actions.

That uncertainty is compounded by the Respondent's unfair labor practices during the backpay period. In April and June of 1993, company officials publicly stated that the Union and union activities were to blame for the layoffs and were the reason why the laid off employees could not be recalled. In June of 1993, the Respondent's president threatened employees with plant closure if they selected the Union. These pronouncements by the Respondent do nothing to quiet doubts that any reductions in work at the plant were untainted by the unlawful antiunion campaign. Uncertainty about the amount of work that would have been available to be performed by the discriminatees during the backpay period is the result of the Respondent's unlawful actions and such uncertainty should therefore be construed in favor of the innocent victims of those unlawful actions. *La Favorita, Inc.*, 313 NLRB at 903; *WHLI Radio*, 233 NLRB at 329–331.

The Respondent presented the testimony of Robert William Kynast, who began with the Respondent in December of 1995 as general manager, and continued in that position until the company was sold. However, since Kynast was not employed by the Respondent until several years after the layoffs, he was not in a position credibly to compare the amount of work available during the prelayoff period relied on in the compliance specification with the level of work available during the backpay period. He also had no personal knowledge of the reasons for the Respondent's decision to restructure and reduce work at the plant in 1993. He acknowledged, moreover, that at times during the backpay period the company had to subcontract out machining work because the Respondent's own assembly department had greater needs than the Respondent's machine department could meet. He conceded that the business calculation about whether it was cost effective to subcontract work out depended in part on how many employees were already employed and how much work there was to do. Thus even if the Respondent concluded during the backpay period that it was cost effective to increase its use of subcontractors, that conclusion was dependant on the prior decisions to unlawfully layoff employees and to restructure to reduce the amount of work performed. For these reasons, Kynast's testimony did not persuade me either that there was a necessary decline in the amount of work available to be performed by the Respondent's employees or that any such decline was unrelated to the Respondent's unlawful antiunion campaign.

Even if I had concluded that a formula based on the overtime worked by comparable employees during the backpay period was preferable to one based on the prediscrimination earnings of the discriminatees, I would have found that the precise method employed by the Respondent was both unacceptable under Board precedent and less accurate than the for-

mula employed in the compliance specification. In order to come up with its per-employee average overtime figure the Respondent divided the overtime hours worked during the backpay period among not only the comparator employees actually working during the backpay period, but also among the discriminatees who did not work at all during that period. This spreads the overtime hours across a larger group than actually worked them and reduces the per-employee average to a level below what was really worked by comparable employees. The Board has repeatedly stated that it is not appropriate to prorate the earnings of comparator employees among the comparators and the discriminatees when calculating average earnings. *Woodline Motor Freight*, 305 NLRB 6, 8 (1991); *Franchi Bros. Construction Corp.*, 237 NLRB 1475, 1476 (1978); *American Casting Service, Inc.*, 177 NLRB 105, 106 (1969).

The Respondent does not cite any contrary Board decisions on this point, but contends that its approach is proper based on the assumption that the total number of overtime hours worked by the Respondent's employees would have remained constant regardless of whether the discriminatees had been unlawfully laid off or not. This contention is not only contrary to the Board law cited above, but unpersuasive given the facts present here. During the backpay period, the Respondent hired 23 new employees in the assembly department, R Exh. 18, and 7 new employees in the machine department, R Exh. 17. The overall overtime hours were divided not only among the discriminatees and the incumbent employees who were spared from the layoffs, but also among the employees newly hired during the backpay period. However, it is safe to assume that some of the new hires would not have been necessary if not for the fact that the Respondent had depleted its staff through the unlawful layoffs. Therefore, even if I were to accept that the total overtime hours worked by permanent employees would have remained constant absent the discrimination, I would still conclude that the Respondent divided the total overtime hours among a larger group of employees than would have actually been working absent the discrimination. The Respondent's calculations result in a substantially reduced average overtime figure.¹⁰ This is an additional basis for finding the Respondent's approach less accurate than the one used in the compliance specification.

The Respondent argues that even if one were to use a formula based on the discriminatees' own prelayoff earnings, the method used in the specification is unfair because it is based on the discriminatees' prelayoff earnings only during calendar year 1992, and ignores the discriminatees' lower earnings during the ten or eleven weeks in 1993 prior to the layoffs. I conclude that, to the contrary, it would unfairly skew the calculation if the discriminatees' average earnings were based on the 15-

month period from January of 1992 through March of 1993. The reason is that the Respondent's business generally tended to decrease during the first quarter of each year, but picked up as the year progressed. 321 NLRB at 749. To arrive at an average by counting two of the traditionally slow quarters, but only one each of the three more active quarters, in the calculation would therefore depress the estimation of average hours worked. At any rate, former employees testified credibly that they remembered being approximately as busy during the first quarter of 1993 as they were during the first quarter of 1992. I conclude that the specification does not significantly or unfairly skew the results by relying on the last full calendar year prior to the layoffs, rather than a 15-month period that includes the early part of 1993.

The Respondent complains that the backpay specification incorporates general wage increases received by incumbents during the backpay period, but ignores the decrease in overtime hours during the same period, and argues that this shows that the General Counsel improperly "cherry picked" postlayoff facts that favored the discriminatees. This argument is facile but without real merit. The General Counsel argues, and I agree, that any decrease in the overtime hours worked by comparable employees during the backpay period is tainted by the Respondent's unfair labor practices. In contrast, the Respondent does not even argue that there was reason to believe the discriminatees would have been denied any of the wage increases granted to comparable employees during the backpay period. Nor did I see any basis in the record for suspecting that the discriminatees would have been denied such raises. Thus the decision to include the salary increases in the backpay calculations and the decision to exclude the alleged decreases in available overtime, are each justified by the record evidence relevant to that particular decision.

I conclude that the average earnings formula used in the backpay specification and advocated by the General Counsel is reasonable and is a more accurate approach than the Respondent's for estimating what the discriminatees would have earned with the Respondent had they not been unlawfully laid off. Therefore, I reject the Respondent's objection to the backpay formula used in the backpay specification.

III. DISPUTES ABOUT AMOUNTS DUE TO DISCRIMINATEES

A. The Backpay Period

The compliance specification is based on a backpay period that begins at the time of the layoffs in March of 1993 and extends for most discriminatees until October 16, 1998. The latter date is two weeks after the date of the Respondent's letters offering the discriminatees unconditional reinstatement. The Respondent raises three general objections to the use of this backpay period. First, the Respondent claims that, even absent the discrimination, the 18 discriminatees who worked in the machine department would have been laid off by the end of 1993 as result of the decision to limit machining work to jobs for companies related to the Respondent's parent corporation. Therefore, the Respondent argues, the backpay period for these discriminatees should terminate on December 31, 1993. Second, the Respondent contends that the backpay period for

¹⁰ The Respondent's approach, moreover, is incoherent to the extent that the Respondent argues that the total overtime hours worked by comparable employees during the backpay period should be divided among those workers and the discriminatees, but does not argue that the total regular hours should be divided in the same manner. The Respondent does not explain why it believes that the total number of overtime hours would have remained constant and should be spread among both discriminatees and nondiscriminatees, but that the total "pie" of regular hours would have somehow expanded to provide an undiminished average number of regular hours per week to each employee.

other discriminatees should end immediately as of the date of the October 2, 1998, letters offering unconditional reinstatement, not two weeks later on October 16th. Third, the Respondent alleges that in October of 1994 offers of reinstatement, or communications regarding reinstatement, sufficient to toll the backpay period were made to four discriminatees.

1. Machine Department Discriminatees

A Respondent may limit its backpay liability by showing that employees laid off for unlawful reasons would have been laid off for lawful reasons at a later date. *So-White Freight Lines*, 301 NLRB 223 (1991), *enfd.* 969 F.2d 401 (7th Cir. 1992). However, “the burden [is] on [the Respondent] to prove with certainty when the discriminatees would have been laid off, absent discrimination.” *Fruin-Colnon Corp.*, 244 NLRB 510, 512 (1979); see also *Daniel Construction Co.*, 276 NLRB 1093, 1097 (1985) (“The burden is on the Respondent to show that, following a discriminatory layoff or discharge, the discriminatees would have been laid off nondiscriminatorily.”); *Masco Products, Inc.*, 198 NLRB 424 (1972) (Respondent did not meet its burden to prove that discriminatee would have been lawfully discharged at a later date had his discriminatory discharge not occurred); *The Buncher Company*, 164 NLRB at 340–341 (the burden of proving that jobs were not available for discriminatees during the backpay period is generally on the Respondent). A Respondent cannot succeed in closing the backpay period based on mere speculation that the discriminatee would have subsequently been laid off for legitimate reasons. *F&W Oldsmobile*, 272 NLRB 1150, 1151 (1984).

As noted above, the Respondent argues that its decision to restructure the company’s machine department to perform work exclusively to meet the needs of companies related to its parent corporation, and not for outside customers as well, would have led the Respondent to discharge the machine department discriminatees by the end of 1993 even if those discriminatees had not been discharged for unlawful reasons in March of 1993. This contention is not persuasive for a number of reasons. First, it is the same argument that the Respondent offered in the underlying unfair labor practice proceeding to justify the March 1993 layoffs, and it was rejected by the Board. *Sumco Mfg. Co.*, 267 NLRB 253, 254 n. 2 (1983) (a respondent is not permitted to relitigate in a compliance proceeding issues that have been litigated in the underlying unfair labor practice proceeding), *enfd.* 746 F.2d 1189 (6th Cir. 1984), *cert. denied* 471 U.S. 1100 (1985). The Board stated that there was a complete lack of evidence that the Respondent had even considered laying off employees for this reason before it became aware of the union campaign. The Board noted that the Respondent did not make the decision to restructure the machine operation until the end of February—“around the very time that the Union filed its [representation] petition.” Now the Respondent raises precisely the contention previously rejected by the Board, except that the Respondent claims the same restructuring justifies the layoffs in December of 1993, instead of in March of 1993. The Respondent does not tie this assertion to any event occurring between the March layoffs and December that would make the argument more persuasive for the later date than for the earlier one. Indeed, it is not clear why the Respondent picks Decem-

ber 31, 1993, as the supposed cut-off rather than any other date during 1993, or for that matter, during the entire backpay period. Not only were there no further layoffs between March and the end of 1993,¹¹ R Exh. 17, but during that period the Respondent was publicly stating that the real reason the discriminatees had been laid off and were not being recalled was the Union and the unfair labor practices charges, not a lack of work. During the hearing on the compliance specification, the Respondent did not call a single Weldun official who was personally involved in the 1993 decision to lay off the discriminatees and restructure the machine department to testify about the reasons for those decisions. The Respondent’s contention that it would have laid off the machine department employees by the end of 1993 for legitimate reasons, even if it had not previously laid them off for unlawful and discriminatory reasons, is speculative and lacks merit.

Another infirmity with the Respondent’s contention is that the Respondent fails to show that if it had laid off employees for lawful reasons at the end of 1993 the discriminatees, rather than other employees, would have been the ones laid off. See *Buncher*, 405 F.2d 787, 790 (3d Cir. 1968), *cert. denied* 396 U.S. 828 (1969). Following the unlawful layoffs in March of 1993, the Respondent retained 34 of the 53 employees working in the machine department and there were no further layoffs in 1993.¹² No evidence was presented at the compliance hearing regarding the standards that would have guided the Respondent’s selection of particular machine department employees for layoff or retention at the end of 1993 and the Respondent did not present evidence at the compliance hearing to show that any of the discriminatees had shortcomings that the retained employees did not have.¹³ The Respondent’s claim that the

¹¹ The Respondent notes that 10535.5 of the Compliance Case Handling Manual recognizes that the Region should take into account whether an employer’s operations and employee complement are reduced during the backpay period. It is well-settled that the provisions of the Casehandling Manual are not binding rules and are merely intended to provide guidance. See, *supra*, fn. 8. At any rate, in this case there were no reductions in employee complement between the unlawful layoffs and the end of 1993.

¹² In the assembly department, 73 of the 83 employees remained after the March layoffs and there were no further layoffs in 1993. R. Exh. 18.

¹³ In its Brief the Respondent makes the remarkable claim that: the “Board specifically found that Weldun selected the 29 employees for layoff for legitimate reasons and not because of their union activities. The employees were selected because they did not possess as [sic] the higher skills or level of performance as those employees who remained working in the machine department.” R. Br. at 23. It is not surprising that the Respondent does not state where the Board “specifically found” this since the Board did not do so. Rather the Board found that while the Respondent did not select particular employees for layoff because of their individual union or protected activities, the Respondent carried out the mass layoff “to intimidate its employees and to discourage them from voting for union representation.” The Board stated that the record was “devoid of any documentation or credited testimony indicating that the Respondent had plans for a layoff of any kind prior to the filing of the [representation] petition.” The Board did not state or suggest that there were “legitimate” reasons based on “skill or level of performance” for the terminations of any of the discriminatees. Indeed, a number of the workers terminated from the machine department in the

discriminatees from the machine department would have been the ones selected for any lawful layoff at the end of 1993 is “mere speculation” and does not justify closing the backpay period as of that time.

Even if one believes that there is uncertainty as to whether some of the discriminatees would have been retained after the end of 1993, that uncertainty does not justify closing the backpay period. The Board is not infrequently faced with situations where it is impossible to know with certainty what would have happened in the absence of a respondent’s unfair labor practices, and in such situations the Board has broad discretion to devise a remedy that effectuates the purposes of the Act. *International Paper Co.*, 319 NLRB 1253, 1278 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997); see also *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304 (2d Cir. 1977); *NLRB v. Carpenters Local 180*, 433 F.2d 934, 935 (9th Cir. 1970). In this case the uncertainty regarding this issue was caused by the Respondent’s own decision to unlawfully lay off the discriminatees in March of 1993. It is appropriate, therefore, to construe such uncertainty against the Respondent, whose unlawful action created it, rather than against the innocent victims of the unlawful action.” The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946); see also *International Paper Co.*, 319 NLRB at 1278 (same).

I conclude that the Respondent has failed to meet its burden of showing that the discriminatees in the machine department would have been laid off for lawful reasons at the end of 1993. Therefore, I reject the Respondent’s objection that the backpay period should close for those discriminatees as of December 31, 1993.

2. 1998 Reinstatements

The Respondent also argues that, for any discriminatees whose entitlement to backpay did not end earlier, the backpay period should close on October 2, 1998—the date of the letters offering unconditional reinstatement to all discriminatees. The compliance specification closes the backpay period two weeks later on October 16, 1998. The General Counsel argues that the date used in the compliance specification is reasonable because after a layoff period of over 5 years the discriminatees are permitted a reasonable period of time to get their affairs in order before returning to work. The General Counsel argues that the Respondent itself recognized that a period of adjustment would be necessary since the Respondent gave the discriminatees until October 16, 1998, to respond to the offers of reinstatement.¹⁴

unlawful layoff had over 15 years experience with the Respondent, and at least two had worked for the company for more than 20 years. See Tr. 65 (Robert Dunning began with Respondent 11/29/65); Tr. 97 (David Mensinger began with Respondent 4/28/70); Tr. 124 (David Pecoraro began with Respondent 7/7/77); Tr. 133 (Kurt Lindhorst started with Respondent 8/30/77); Tr. 179–180 (Delmar Kirksey began with Respondent in 1977).

¹⁴ The October 2, 1998, letter offering reinstatement gave the discriminatees until October 12, 1998, to respond. However, Robert Ky-

The offers of reinstatement did not require the discriminatees to report before October 26, 1998, but did not prohibit them from returning earlier.

The Board has held that the backpay period is not tolled when an offer of reinstatement is made, but rather continues to run until the date of actual reinstatement, the date of rejection of the offer of reinstatement, or, if the offeree does not reply, the date of the last opportunity to accept. *C-F Air Freight, Inc.*, 276 NLRB 481, 482 (1985); *Seyforth Roofing Co. of Alabama*, 263 NLRB 368, n.2 (1982); *Southern Household Products*, 203 NLRB 881, 882 (1973). Therefore, the Respondent’s argument that backpay should be tolled immediately as of the date of the October 2, 1998, letter, fails. The Respondent did not establish that any of the discriminatees for whom relief is sought during the 2-week period had actually been reinstated by October 2nd, or had declined reinstatement by October 2nd, or had allowed a deadline for response to pass by October 2nd or any other date prior to October 16th.¹⁵ Indeed, the Respondent has not shown that as of October 2nd, the discriminatees had even received the letters offering reinstatement. Under the circumstances, including the lengthy backpay period and the lack of evidence that any of the triggers for closing the backpay period were satisfied prior to October 16th, I conclude that the October 16th date allows a reasonable period of readjustment and effectuates the policies of the Act. The purpose of a Board remedy is to undo the effects of a violation of the Act. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. at 346; *Phelps Dodge Corp v. NLRB*, 313 U.S. 177, 194 (1941). That purpose would not be advanced if the backpay period were tolled before the discriminatees could reasonably be expected to return to work pursuant to an offer of reinstatement.¹⁶

nast, who signed the offers, testified that a subsequent letter may have extended that deadline to October 16, 1998.

¹⁵ One of the discriminatees, Meryl Ray Zion, testified credibly that after being reinstated he worked only three days before the Respondent ceased operations, which occurred on or about October 30. This indicates that, at least in Zion’s case, actual reinstatement did not occur until after both the date forwarded by the Respondent and the date forwarded by the Regional Director and the General Counsel. In addition, since essentially all of the discriminatees accepted reinstatement there is not any issue about the backpay period closing because a discriminatee declined reinstatement or failed to respond. The only discriminatee who the record definitively shows did not accept a reinstatement offer was Jerry Thompson, who had died. The General Counsel seeks no backpay for Thompson for the period after the first quarter of 1998, see General Counsel’s Amended Schedule E26 (attachment to General Counsel’s Brief), and therefore, the offer of reinstatement in October of 1998 is not an issue with respect to the backpay sought for Thompson. One discriminatee, Eugene Boone, had moved from Michigan to Virginia prior to when the Respondent offered him reinstatement in 1998. However, Boone’s uncontradicted testimony was that he accepted the reinstatement offer and returned to work with the Respondent.

¹⁶ The Respondent cites *Citizen’s Hotel Co.*, 131 NLRB 834, fn. 3 (1961), enf. 313 F.2d 708 (5th Cir. 1963), a 40-year-old decision in which the Board denied two discriminatees backpay for the period between the time of the employer’s requests that the discriminatees return to work immediately and the discriminatees’ actual returns to work. In that case, the employer asked the two discriminatees to return to work “immediately,” but the Board found that the discriminatees did

I conclude that the Respondent's objection to the specification's grant of backpay for the period from October 2, 1993, to October 16, 1993, must be rejected.

3. 1994 Reinstatement Offers and Inquiries

The Respondent alleges that it made an earlier round of reinstatement offers and inquiries in October of 1994, and that those contacts were sufficient to toll the backpay period for four individuals—Rex Jackson, Timothy Hunt, Sr., David Sinner, and Meryl Zion.¹⁷ An offer of reinstatement does not toll backpay unless the position offered is substantially equivalent to the position the person held previously. *Thalbo Corp.*, 323 NLRB 630, 637–638 (1997), *enfd.* 171 F.3d 102 (2d Cir. 1999); *Sumco Manufacturing Co.*, 267 NLRB at 258. A position is not substantially equivalent if it is on a different shift, *Id.*, *Associated Grocers*, 295 NLRB 806, 807 (1989), does not offer equivalent compensation, or does not include restoration of the seniority acquired prior to an unlawful discharge, *Thalbo Corp.*, 323 NLRB at 637–638, *Sumco Manufacturing Co.*, 267 NLRB at 258.

In 1994, the individuals at issue were not offered reinstatement to positions substantially equivalent to the ones they had prior to the unlawful layoff, and therefore their backpay periods are not tolled. Discriminatee Jackson was offered reinstatement to a different position than he held before the unlawful layoff, at a lower rate of pay, on a different shift. Discriminatee Hunt was offered reinstatement to a position in a different department from the one he had worked in before the layoff, and was told that he would have no seniority for the first year and only 75 percent of his prediscrimination seniority after the first year. Discriminatee Sinner was offered reinstatement to a position that involved more limited duties and tasks than his prelayoff position, and was told that his seniority would not be restored

not return “promptly.” To the extent that *Citizen's Hotel* may have once stood for the general principle that backpay is always tolled immediately as of the date when an offer of unconditional reinstatement is made, it has been overruled by subsequent decisions such as *C-F Air Freight, Inc.*, 276 NLRB at 482, *Seyforth Roofing Co. of Alabama*, 263 NLRB at 368, *fn. 2*, and *Southern Household Products*, 203 NLRB at 882. Moreover, the facts in *Citizen's Hotel*, are different in significant ways from those present here. In *Citizen's Hotel* the period between the layoffs and the offers of reinstatement was less than two months. Under those circumstances one would expect that the discriminatees would need little if any time to adjust before returning to work. In the instant case, by contrast, it was over five years before the Respondent offered unconditional reinstatement to the discriminatees. Under those circumstances, a return to work as of October 16th—2 weeks after the offer—is still “prompt.” Secondly, in *Citizen's Hotel* the employer asked the discriminatees to return “immediately.” In the instant case the Respondent did not ask the discriminatees to return to work immediately. Rather the Respondent informed the discriminatees that they had until October 26th to report for work. While the Respondent did not state that the discriminatees were precluded from returning immediately, it also did not state that the discriminatees' immediate return was either possible or desired. Even if one believes that *Citizen's Hotel* has not been overruled, its extension to the set of facts present here would not be reasonable or fair.

¹⁷ A fifth discriminatee, Delmar Kirksey was actually reinstated at this time, however, the General Counsel seeks no backpay for him for the period after such reinstatement.

for 12 to 18 months. These offers were not for substantially equivalent employment and do not toll the backpay periods for Jackson, Hurt, and Sinner. Nor should amounts that the discriminatees might have earned had they accepted the positions offered by the Respondent in 1994 be deducted from their backpay awards. The Board has held that an employee may decline to work for a respondent in a position that is not substantially equivalent to his or her prediscrimination position without affecting backpay. *Sumco Manufacturing Co.*, 267 NLRB at 258.

Zion was never offered reinstatement to *any* position. He telephoned the Respondent in response to the October 1994, letter, and was told what openings the Respondent was seeking to fill. It is well-settled that an offer of employment must be specific, unequivocal and unconditional in order to toll backpay and satisfy a respondent's remedial obligation.” *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), *enf. denied* 947 F.2d 588 (2d Cir. 1991). “Merely indicating that [the company] ha[s] an immediate opening is not the same as offering the position to [the discriminatee].” *Thalbo Corp.*, 323 NLRB at 637. Moreover, Zion testified without contradiction that he lacked the skills required to perform any of the jobs that were mentioned to him when he telephoned the Respondent. Under the applicable standards, Zion's contact with the Respondent does not toll his backpay.

I conclude that the Respondent's objection based on the offers of reinstatement and inquiries regarding reinstatement in October of 1994 must be rejected.

B. Settlement Agreements

On the same day that the discriminatees were permanently laid off, the Respondent presented them with written settlement agreements offering enhanced severance benefits in exchange for the discriminatees releasing the Respondent “from any and all claims of any nature whatsoever” relating to their employment, including any claims under the National Labor Relations Act. Five of the discriminatees—Jim Doud, Robert Dunning, Delmar Kirksey, Kurt Lindhorst and Jerry Thompson executed the releases and received enhanced severance benefits. The Respondent argues now, as it did in the unfair labor practices proceeding, that the private settlement agreements preclude any backpay to these five employees. The General Counsel argues that the private settlement agreements should not preclude these five discriminatees from receiving backpay awards, but that the amount of severance pay received should be deducted from the backpay awards in order to prevent unjust enrichment.¹⁸

¹⁸ The General Counsel states that the severance payments received by the discriminatees who did not execute settlement agreements should also be deducted from their backpay awards in order to avoid unjust enrichment. General Counsel's Brief at 18; see also *Sheller-Globe Corp.*, 296 NLRB 116, 117 (1989) (severance payments legitimate offset to backpay). The original compliance specification did not provide for such a set-off and the Respondent submitted a response which argued that it should have. GC Exhibit 1(i), Paragraph 17(b). The General Counsel has submitted revised schedules for the claimants who received severance benefits, and these schedules set-off the severance payments against the backpay claimed. There no longer appears to be disagreement between the parties regarding this objection.

The General Counsel argues that in the underlying unfair labor practices case the Board already considered, and rejected, the Respondent's claim that all backpay is precluded by the settlement agreements.

I agree with the General Counsel that the Respondent is attempting to relitigate a matter that was already ruled on by the Board in the underlying unfair labor practices case. The Board, in its prior decision, discussed the Respondent's contention regarding the private settlement agreements, but issued an Order that specifically provided that Doud, Dunning, Kirksey, Lindhorst and Thompson were all entitled to both reinstatement and make-whole relief. 321 NLRB at 734 fn. 6 and 737. The Board stated that it was "limiting the inquiry" at the compliance stage to how the amounts provided by the settlement agreements would affect the backpay available, and the Board explicitly rejected the Respondent's argument that the agreements would preclude the reinstatement remedy. *Id.* Moreover, the Board distinguished the settlements in this case from those in *Hughes Christensen*, 317 NLRB 633 (1995), a case in which the agreements were found to bar a remedy. The Board noted that in *Hughes Christensen* the employees who signed the settlements were members of a union negotiating committee and that they did not agree to the settlements until after their charges had been dismissed by the Board's regional director for lack of merit. In the instant case, the discriminatees not only did not belong to a union negotiating committee, but at the time they signed the agreements they were apparently unaware that the Union had filed or was intending to file charges relating to the layoffs. In addition, the discriminatees in the instant case signed the releases before the Board had reached any decision at all regarding the legality of the layoffs. The Board's Decision and Order in the underlying unfair labor practices case are susceptible to only one reasonable interpretation -- i.e., that the agreements were not enforceable to completely preclude a backpay remedy.

The Respondent argues that *Hughes Christensen* controls the instant case, and dictates that I deny any backpay at all to the five discriminatees who signed settlement agreements. The Respondent states that in the underlying unfair labor practices case the Board only held that there "might" be significant distinguishing features between the instant case and *Hughes Christensen*. Respondent's Brief at 27. Contrary to the Respondent's representation, the Board did not state that *Hughes* "might" be distinguishable from the instant case. Rather, the Board stated that the "settlement agreements [in the instant case] are distinguishable from those at issue in *Hughes*" 321 NLRB at 734 n. 6 (emphasis added), and indicated that this was a basis for limiting the inquiry regarding the effect of those settlements on the remedy. The Board has already made its decision on this issue, and has held that the settlement agreements do not preclude make-whole relief for the five employees

who signed them. I am not free to re-visit the merits of the Respondent's arguments that the agreements meet standards for enforceability or that *Hughes* controls the instant case. Rather, I accept the General Counsel's revised schedules in which the added severance pay amounts provided for under the settlements are deducted from the gross backpay.¹⁹

I conclude that the Respondent's objection that the settlement agreements preclude any relief for the five discriminatees who signed them must be rejected.

C. Issues Affecting Individual Discriminatees²⁰

Eugene Boone

Facts: At the time he was unlawfully laid off, Eugene Boone was working for the Respondent in the assembly department earning \$11.50 per hour. Soon after being laid off, Boone began interim employment with Detroit Tool Industries (Detroit Tool). Boone continued working there until he voluntarily ended his employment on April 5, 1996, so that he and his wife could move to Jonesville, Virginia, and care for his wife's ailing mother. At the time Boone left Detroit Tool Industries he was earning \$12.50 per hour. Had he continued to work for the Respondent until that time he would, apparently, have been earning approximately \$13.10 per hour.

After moving to Virginia, Boone was unemployed briefly and then began a job with a tree service at a wage of \$5 per hour. He subsequently left that job for a position with an electrical contractor where he started at \$8.50 per hour and eventually was paid \$10.50 per hour.

Analysis: The compliance specification, as amended, includes \$17,628.15 in net backpay and \$4961.65 in medical costs for Boone. These sums cover the period from the unlawful layoff through October 16, 1998. The Respondent argues that backpay ceases to accrue when a discriminatee leave the area for personal reasons, rather than as part of an effort to obtain employment, and cites precedent supporting that position. Respondent's Brief at 30, citing *Laborers Local 158, (Contractors Assn. Of E. Pa.)*, 301 NLRB 35, 41 (1991), enf. 952 F.2d 1393 (3d Cir. 1991); *Duroyd Mfg.*, 285 NLRB 1, 2 (1987) (discriminatee's backpay period tolled when he moved from the Respondent's vicinity to his invalid parents' home, where he planned to stay, "job or no job."). The General Counsel concedes that Boone voluntarily reduced his earnings when

¹⁹ Pursuant to the settlement agreements, the Respondent also made payments to cover the cost to the employees of continuing their coverage under the Respondent's health plans. Since these payments were made in lieu of the insurance that the Respondent would have provided to the discriminatees if not for the unlawful layoffs, I find that those amounts should not be offset against the backpay awards.

²⁰ During the compliance hearing, the Respondent withdrew its objections: that the medical expenses for Jerry Boone had been discharged in bankruptcy and would not have been covered under the Respondent's insurance plan, Tr. 428; that the out-of-pocket expenses for Steven Collins were excessive and not accurate, Tr. 368; that the medical expenses for John Delaney were improper, Tr. 156; that the medical expenses for David Mensinger were excessive and not accurate, Tr. 100-101; and that Jeff Steinke was not entitled to backpay after the end of 1993, Tr. 11. The General Counsel withdrew the claim for \$104,736.40 in principal for discriminatee Dennis Meyers. Tr. 8.

At trial the Respondent withdrew its argument that there should be a set-off for vacation pay received at the time of the terminations. Tr. 364. It became clear from the testimony of witnesses that the discriminatees accumulated the full year's worth of vacation pay at the beginning of each calendar year. Therefore, the vacation pay was already due them at the time of the terminations and should not be set off.

he left Detroit Tool on April 5, 1996, and went to work in lower paying jobs in Virginia. With its brief the General Counsel has submitted amended backpay schedules to reflect interim earnings at the higher level Boone would have received had he continued to work for Detroit Tool. Under this approach Boone would still receive backpay for the period that he worked in Virginia, but only for the difference between what he would have earned had he continued to be employed by the Respondent and what he would have earned had he remained at his job in Michigan with Detroit Tool.

The evidence indicates that Boone did not leave Michigan and his job with Detroit Tool because of any dissatisfaction with that job or because of a desire to mitigate backpay, but rather because of the unrelated personal reasons described above. At the time he left he was earning wages almost as high as he would have received had he been retained by the Respondent. I believe the evidence gives every reason to believe that Boone would have left the Michigan area for personal reasons when he did even if he had still been working for the Respondent. The precedent cited by the Respondent supports the proposition that backpay is tolled when an individual leaves the area for personal reasons unrelated to the unfair labor practices. The General Counsel has offered no contrary authority to support its approach regarding this issue. Therefore, I conclude that the Respondent is correct that Boone's backpay should be tolled after the first quarter of 1996.²¹

The General Counsel also seeks compensation for certain out-of-pocket medical expenses incurred by Boone during the backpay period that would have been paid by his health insurance had he continued to be employed by the Respondent. In its response to the compliance specification, the Respondent contended that Boone was not entitled to some of these expenses because they were not covered by the Respondent's health insurance, and because Boone's debts, including his medical-related debts, were discharged in bankruptcy. During the compliance hearing, the Respondent withdrew those objections. Tr. 428. I conclude that Boone is entitled to the medical expenses claimed for the period prior to when he relocated to Virginia for personal reasons.²²

Dawn Condon

Facts: Dawn Condon was an electrical technician in the Respondent's Assembly Department prior to being unlawfully laid off on March 11, 1993. After the layoff she worked at Wal-Mart for two weeks and then as an electrical technician at Excel Controls (Excel) from November of 1993 until April of 1994. Both

Wal-Mart and Excel were farther from her home than the Respondent's facility. After Condon left Excel she started work for Dane Systems (Dane), which was about the same distance from her home as was the Respondent.

Analysis: The compliance specification includes an assessment of the additional commuting expenses that Condon incurred in order to maintain her interim employment. The Board considers these types of expenses to be an offset to the amount of interim earnings and thus recoverable. *Sargent Electric Company*, 255 NLRB 121 (1981), enfd. 676 F.2d 687 (3d Cir. 1982); *Aircraft and Helicopter Leasing and Sales*, 227 NLRB 644, 644-45 (1976), enfd. 570 F.2d 351 (9th Cir. 1978). In its response to the compliance specification, the Respondent objected that the expenses claimed for Condon were excessive and not accurate. The burden of establishing that such expenses were not incurred, or were excessive or inaccurate is on the Respondent. *United Enviro Systems*, 323 NLRB 83, 86 (1997); *Sargent Electric*, 255 NLRB at 121. The fact that expense computations are based on estimates does not preclude their acceptance. *Aircraft and Helicopter*, 227 NLRB at 645.

At the hearing, the General Counsel withdrew its claim that Condon was entitled to any commuting expenses for the period she worked at Dane, Tr. 151, but maintains that Condon is entitled to commuting expenses for the periods when she worked at Wal-Mart and Excel. Based on Condon's uncontradicted testimony that her commutes to Wal-Mart and Excel were both significantly longer than her commute to the Respondent, I conclude that the revised expenses for Condon stated in the General Counsel's amended schedule E-3 are proper, and reject the Respondent's objection.

Robert Dunning

Facts: Robert Dunning worked for the Respondent from November 29, 1965, until the Respondent unlawfully laid him off on March 12, 1993. At the time he was laid off, Dunning was a group leader/top bench man in the machine department. Dunning was one of the individuals who signed the settlement agreement that the Respondent presented to him at the time of the unlawful layoff. Under this settlement Dunning received, inter alia, an insurance premium advance of \$2000 to continue his coverage under the Respondent's health insurance plan for a period of six months. Dunning testified that he chose not to use the advance premium for that purpose because he was covered under the health insurance that his wife had with her employer, and because the cost of continuing the insurance he had with the Respondent was high.

In 1993, Dunning paid \$1.59 per week for the family dental plan he had through the Respondent. That family dental plan covered 100 percent of preventive and maintenance dental services. Although Dunning found interim employment after being unlawfully laid off by the Respondent, his interim employer did not have a dental plan and his wife's health plan covered only a small portion of dental expenses.

Analysis: The compliance specification includes \$899.30²³ in dental expenses for Dunning. Compliance Specification,

²¹ I conclude that Boone's net backpay is \$4817.95. This is based on the backpay figures for the period from the first quarter of 1993 through the first quarter of 1996 that are stated in the General Counsel's amended schedule E-1, which was attached to the General Counsel's Brief. Amended Schedule E-1 states a total net backpay figure of \$17,628.15, but this is for the longer backpay period that I have rejected.

²² I conclude that Boone is entitled to \$2002.00 in medical expenses. This is based on the figures stated in General Counsel's schedule F-1 for the period ending with the first quarter of 1996. GC Exh. 1(c). The schedule states total medical expenses of \$4961.65, but that includes medical expenses for the longer backpay period that I have rejected.

²³ The compliance specification provides for a total of \$1649.30 in medical expenses for Dunning. This figure includes chiropractic ex-

Schedule F-5 (GC Exh. 1(c)). In its response to the compliance specification, the Respondent argues that not all the dental expenses that the Respondent claims for Robert Dunning were covered by the Respondent's health insurance.

It is customary to include medical expenses that would have been covered under a fringe benefit plan as part of make-whole relief. *G. Zaffino & Sons*, 289 NLRB 571, 573 (1988). The General Counsel has the burden of showing the medical expenses and of showing that the Respondent's insurance program would have covered them. *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1198 (1982). The Respondent then has the burden of introducing any evidence that would negate or mitigate its liability. *G. Zaffino & Sons*, 289 NLRB at 573.

I believe that the General Counsel has presented sufficient evidence to substantiate the amount of covered dental expenses claimed in the compliance specification. The General Counsel introduced an account summary from the dental office where Dunning and his wife were treated. GC Exh. 4. Although the charges there do not correspond precisely to the expenses included in the compliance specification, the records indicate that Dunning made payments of over \$1800 for dental services from October of 1993²⁴ until the end of the backpay period. As noted above, Dunning's plan would have covered 100 percent of all preventive and maintenance dental services. The premiums he would have paid for dental insurance over the course of the 291-week backpay period had he continued to work for the Respondent would have totaled \$462.69, assuming that the weekly cost to Dunning of \$1.59 had remained constant. Therefore, if one deducts the premiums that Dunning did not have to pay from the covered dental expenses he did have to pay, see *Stage Employees IATSE Local 644 (King-Hitzig)*, 272 NLRB 1234, 1235 (1984) (premiums the discriminatees would have paid for medical insurance are deductible from gross backpay), the result is a figure in excess of that sought in the compliance specification.

William H. Davis III, who oversaw employee benefits and compensation for the Respondent, testified at the compliance hearing. Davis did not opine that any of the dental expenses listed for Dunning in the compliance specification or the dental account history would not have been 100 percent covered under

penses that the Respondent is not contesting, as well as the dental expenses.

²⁴ I do not include dental expenses for the first six months after Dunning agreed to the settlement, since those presumably would have been covered had Dunning used the \$2000 insurance premium advance that the Respondent provided to him for the intended purpose of continuing his health insurance for 6 months. As noted supra, I have accepted the General Counsel's argument that the \$2000 was paid in lieu of insurance that the Respondent would have provided had it not unlawfully terminated Dunning, and therefore have not deducted the \$2000 from the backpay award. Given that, I believe that it would be unfair to also hold the Respondent responsible for medical expenses that would have been paid by the plan during the 6-month period after the layoff if Dunning had used the \$2000 insurance premium advance to continue his insurance. The medical expenses stated for Dunning in the compliance specification also do not include any expenses incurred during that 6-month period, Schedule F-5 (GC Exh. 1(c)), suggesting that Acting Regional Director may have reached the same conclusion.

the family dental plan that Dunning had with the Respondent.²⁵ Nor does the Respondent's brief allude to any evidence showing that specific dental expenses claimed for Dunning would not have been fully covered under its plan.²⁶

I conclude that the dental expense figure of \$899.30 included in the compliance specification is reasonable and supported by the record.

David Lyle Mensinger

Facts: David Lyle Mensinger began working for the Respondent on April 28, 1970, and was unlawfully laid off on March 12, 1993. Mensinger found interim employment with South Shore Tool, and subsequently had surgery that prevented him from working during a period of recovery lasting six weeks from Thanksgiving until the end of the year. Mensinger testified that the six-week period "probably" occurred in 1998, but that it could also have occurred in 1997. Tr. 103.

Analysis: The compliance specification, as amended, includes net backpay of \$34,674.49 for Mensinger. The Respondent states that Mensinger is not entitled to the portion of this backpay figure attributable to the six-week period when Mensinger was recuperating from surgery "in 1997." The Board has held that a discriminatee is not entitled to backpay for a period during which he or she was unavailable for work. See *Superior Export Packing Co., Inc.*, 299 NLRB 61, 65-66 (1990); *American Mfg. Co.*, 167 NLRB 520 (1967).

The Respondent has the burden of establishing the defense that a discriminatee was unavailable for work during the backpay period. *Superior Export Packing*, 299 NLRB at 66;

NLRB v. Brown & Root, 311 F.2d 447, 454 (8th Cir. 1963). I conclude that the Respondent has failed to meet this burden. Mensinger testified that the period when he was unavailable to work for medical reasons was "probably" in 1998, during the period from Thanksgiving to the end of the year. If so, it was outside the backpay period, which ended in October of 1998, and thus would not affect the backpay amount owed. Mensinger did allow that the period of unavailability may actually have occurred in 1997, in which case it would be within the backpay period and would justify a set off. There was no evidence however, other than the ambiguous testimony of Mensinger himself, about which year included the period of incapacity. That testimony was that the incapacity "probably" occurred outside of the backpay period. There was no basis in the record to conclude that Mensinger's period of recuperation probably occurred in 1997, and Mensinger's demeanor and testimony did not suggest to me that he was being purposely vague about the timing of his incapacity. The interim earnings figures contained for Mensinger in the compliance specifica-

²⁵ Davis testified that for orthodontia work there was a \$50 deductible, after which the plan would pay 50 percent of the costs up to a lifetime total of \$1000. Orthodontia refers to the dental specialty of correcting abnormally aligned or positioned teeth. The American Heritage Dictionary, College Edition (1976), p. 928. None of the services indicated in the account history for Dunning appear to fall into this category.

²⁶ The Respondent does maintain that Dunning is entitled to no relief at all since he executed a settlement agreement. As discussed supra, that contention has been rejected by the Board.

tion, and which have not been challenged by the Respondent, showed that he had no drop in earnings during the fourth quarter of 1997. This supports, to some extent at least, Mensinger's belief that the incapacity occurred at the end of 1998. Since the Respondent has the burden of establishing the defense based on incapacity, and has not done so, no set-off is proper.

I conclude that the Respondent has failed to show that Mensinger had a period of incapacity during the backpay period, and therefore I reject the Respondent's objection.

David Bruce Pecoraro

David Bruce Pecoraro worked for the Respondent from June 7, 1977, until the Respondent unlawfully laid him off from the machine department on March 12, 1993. In its response to the compliance specification, the Respondent objected that the amounts sought for Pecoraro were not accurate, but did not specify which amounts or why. In the brief it submitted after the compliance hearing, the Respondent does not dispute the specific amounts sought for Pecoraro other than to argue that he would have been discharged for lawful reasons at the end of 1993 along with the rest of the machine department discriminatees.²⁷

I conclude that the Respondent has not supported its objection based on the accuracy of the specific amounts sought. Therefore, I reject the Respondent's objection.

Norman Shayne Smith

Facts: Norman Shayne Smith started working for the Respondent on August 3, 1992, and was unlawfully laid off in March of 1993. During the period of his employment with the Respondent, he attended college on a part-time basis. After the unlawful layoff he continued to attend college part-time until May of 1993, and then in September of 1993, he began at another college on a full-time basis. Prior to starting as a full-time college student, Smith actively sought interim employment.

Analysis: In its response to the compliance specification, the Respondent argued that Smith should not receive backpay because he removed himself from the job market on March 12, 1993, when he applied for college and did not seek interim employment. The Respondent has withdrawn this argument for the period prior to September of 1993 when Smith began attending college full-time, but still argues that backpay should be denied thereafter. Accordingly, the Respondent has submitted an amended backpay schedule for Smith that provides backpay only for the period prior to September of 1993. The General Counsel apparently agrees with this backpay period for Smith, and has submitted an amended backpay schedule for him that provides backpay only for the period prior to September of 1993. The total backpay amount stated in the General Counsel's amended schedule is \$7,265.76. There no longer appears to be a dispute between the parties regarding the backpay period applicable to Smith, and the evidence supports their joint conclusion regarding his backpay period.

²⁷ The Respondent's general argument that all the unlawfully terminated machine department employees would have been terminated for lawful reasons by the end of 1993 applies to Pecoraro. I have rejected this argument for the reasons discussed above.

I conclude that Smith's entitlement to backpay ends as of September of 1993.

James Wade Whitehead

Facts: James Wade Whitehead began working for the Respondent in 1989. During the unfair labor practices trial the parties stipulated that Whitehead was transferred from an assembly position to one in the engineering department on February 22nd, prior to his layoff in March of 1993. During the compliance hearing the Respondent questioned Whitehead about this, and Whitehead denied being transferred to the engineering department. He stated, rather, that he had agreed to help out in the engineering department's print room on a temporary basis at the request of his supervisor. He further stated that if he had been asked to permanently transfer from his tool maker position to one in the print room he would have declined since the print room pay was much lower than what he was earning.

Analysis: The compliance specification, as amended, includes backpay and medical expenses for Whitehead totaling \$31,567.08. Whitehead was identified as a discriminatee entitled to make-whole relief in the orders of both Judge Batson and the Board. The Court of Appeals enforced that portion of the Board's order which granted make-whole relief to Whitehead. Nevertheless, the Respondent argues that Whitehead is not a proper discriminatee and should not be accorded make-whole relief in this compliance proceeding, because he had been transferred to the engineering department at the time of the layoff and therefore was no longer an employee of the prospective bargaining unit. The Respondent's position, essentially, is that Whitehead's layoff cannot logically have been part of the Respondent's unlawful effort to discourage members of the prospective unit from supporting the Union since Whitehead was no longer in the prospective unit when he was laid off.

Once again, the Respondent is improperly attempting to use this compliance proceeding to relitigate an issue already decided unfavorably to it in the underlying labor practices proceeding. As the General Counsel notes, the Respondent had the opportunity to argue to both the Board and the Court of Appeals that Whitehead was not a valid discriminatee and the Respondent either did not do so, or the argument was rejected. The issue of Whitehead's status as a discriminatee has already been decided by the Board and the Court of Appeals and is *res judicata*. *Carrothers Construction Co.*, 274 NLRB 762, 762-63 (1985); *United Air Conditioning Co.*, 141 NLRB 1278, 1280 (1963), *enfd.* 336 F.2d 275 (6th Cir. 1964).

The Respondent states that even if I do not overrule the Board's decision, I should recommend that the Board "at least reconsider its findings about Whitehead." I decline this invitation. I note that the Respondent itself, over the General Counsel's objection, elicited testimony from Whitehead about the transfer and Whitehead stated that he had merely been helping out in the engineering department, not permanently transferred there. In addition, even if Whitehead was transferred out of the prospective unit shortly before his layoff as was stipulated to in the unfair labor practices trial, that does not foreclose the possibility that his discharge was part of the Respondent's unlawful effort to use a mass layoff to intimidate other employees and discourage union support within the prospective unit.

I conclude that the Respondent's objection that Whitehead is not a proper discriminatee has already been decided adversely to the Respondent in the underlying unfair labor practices case, and may not be relitigated in this compliance proceeding. Therefore, I reject that objection.

Meryl Ray Zion

Facts: Meryl Ray Zion was employed by the Respondent from 1980 until the Respondent unlawfully laid him off in March of 1993. At the time of his discharge, Zion was working in the Respondent's machine repair department earning \$14.50 per hour. His duties consisted almost exclusively of a specialized type of machine refurbishing referred to as "scraping." Scraping is a technique for restoring components of certain machines to their original tolerances by leveling or straightening surfaces that have become worn. Zion began working as a scraper in 1968 and worked in this field until, at the age of 51, he was laid off by the Respondent.

Immediately after being laid off, Zion sought work as a scraper. However, he did not secure any permanent scraping work. It was not until late 1994 that he found any scraping work at all, and then only on a temporary, out-of-state, project that ended after six weeks. In 1995, Zion purchased business cards that he used to try to find work scraping as a contractor, but this effort was unsuccessful. According to Zion, the demand for the specialized type of refurbishing he was trained to do was disappearing due to changes in the machines used by manufacturers.

Beginning in 1994, Zion also started a business selling sandwiches and other food items from a truck. He bought the equipment and supplies to do this and traveled to various outdoor events where he sold his product. Zion continued with this business until 1996, but the business lost money every year that it operated.

In 1997 and 1998, the Respondent heard that trailer factories were hiring, and he approached a number of these companies for work. However, the companies were primarily hiring persons with plumbing, welding, or other skills that Zion did not possess. These companies did have some lower skilled "piece work" jobs, but according to Zion none of these high-volume jobs were not offered to him, apparently because the companies believed that a man of Zion's age could not keep pace with the work. In 1998, a friend of Zion's trained him in basic welding techniques. Zion applied for welding work, but was turned away by employers who were seeking only certified welders. In October of 1998, Zion accepted the Respondent's unconditional offer of reinstatement, and worked for three days before the Respondent shut the plant down.

Analysis: The compliance specification, as amended, includes \$181,180.05 in backpay and medical expenses for Zion for the period from his unlawful layoff until October 16, 1998. The Respondent argues that Zion failed to mitigate damages and that his backpay should therefore be tolled. The Respondent contends that Zion did not seek machinist work after being laid off, but rather "embarked on a self-employment path which provided him with no actual or net income." The Respondent cites *Associated Grocers*, 295 NLRB at 810-11 and *NHE/Freeway Inc.*, 218 NLRB 259, 260 (1975), enfd. 545 F.2d

592 (7th Cir. 1976), for the proposition that an individual must seek work in his specialty. The Respondent notes that Zion said that some of the companies had "line" jobs available, but that Zion did not seek these positions because he believed he was unqualified.

The burden is on the Respondent to show that a backpay claimant incurred a willful loss of earnings by refusing to take new employment or by neglecting to make reasonable efforts to find interim work. *Thalbo Corp.*, 323 NLRB at 635; *Inland Empire Meat Co.*, 255 NLRB 1306, 1308 (1981), enfd. mem. 692 F.2d 764 (9th Cir. 1982). The claimant is required to "make reasonable efforts to find substantially equivalent employment," but "[t]here is no requirement . . . that their efforts meet with success," *Ryder System*, 302 NLRB 608, 609 (1991) (citing *Mastro Plastics Corp.*, 136 NLRB at 1349), enfd. 983 F.2d 705 (6th Cir. 1993). The claimant is only required to make an "honest, good faith effort." *Lloyd's Ornamental & Steel Fabricators*, 211 NLRB 217 (1974). Self-employment is an acceptable way to attempt to mitigate, and there is no requirement that the self-employment be a financial success. *Aircraft & Helicopter Leasing*, 227 NLRB at 646-647.

The Respondent's contention that Zion failed to mitigate his damages is not supported factually or legally. The only testimony on the subject is Zion's own. He stated that he sought work in his specialty immediately after being unlawfully laid off and for the remainder of 1993, Tr. 231-32, that he found some temporary work in that specialty in 1994, Tr. 232, and that he began a renewed effort to find that type of work in 1995, Tr. 239. Because his efforts to find work in his specialty were not proving successful Zion invested his savings into starting his own food service business, but this business failed. Then he tried to learn a new skilled trade --welding-- but could not find work in that field either. Zion managed to find out about some lower skilled jobs, but despite his inquiries he was never offered any of those jobs.

Based on the evidence of record, I conclude that Zion made an "honest, good effort," to find interim employment in his former specialty, and in other fields. His efforts were largely unsuccessful, but success is not the necessary result of reasonable effort. I conclude that the Respondent has not met its burden of showing that Zion failed to make reasonable efforts to mitigate his damages by finding interim employment. Therefore, I reject the Respondent's objection based on Zion's alleged failure to mitigate.

CONCLUSION

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.²⁸

ORDER

The Respondent, its officers, agents, successors, and assigns, shall make whole the discriminatees by payment to them of the

²⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

amounts set forth below, plus interest calculated in manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The names of the employees to whom payment shall be made and the amounts to be paid plus interest, are as follows:²⁹

²⁹ Consistent with the findings and conclusions in the body of this supplemental decision, the amounts stated are generally taken from the figures set forth in GC Exh. 5 (the Second Amended Compliance Specification submitted by the General Counsel at the compliance hearing), as further amended by the revised schedules submitted as attachments to the General Counsel's brief. The one exception relates to discriminatee Boone, with respect to whom the Respondent properly contends that no relief should be provided for the period after the first

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quarter of 1996 when Boone left Michigan for personal reasons unrelated to the Respondent's unlawful conduct. See *supra* notes 21 and 22. For a breakdown of the remedy for each discriminatee by calendar quarter, the parties are directed to refer to the schedules and amended schedules submitted by the General Counsel. See Attachments to General Counsel's Brief; GC Exh. 1(c); GC Exh. 2; GC Exh. 5.

NAME	BACKPAY	MEDICAL	INSURANCE	TOTAL
1. Jerry Boone	\$ 4,817.95	\$ 2,002.00		\$ 6,819.95
2. Steven Collins	\$ 29,944.85			\$ 29,944.85
3. Dawn Condon	\$ 30,724.43	\$ 418.42		\$ 31,142.85
4. Kenneth Curtis	\$ 47,572.36			\$ 47,572.36
5. John Delaney	\$ 5,914.75	\$ 4,845.88		\$ 10,760.63
6. Jim Doud	\$ 77,293.44	\$ 448.16		\$ 77,741.60
7. Robert Dunning	\$ 21,875.45	\$ 1,649.30		\$ 23,524.75
8. Donald Hill, Jr.	\$ 2,124.20			\$ 2,124.20
9. Timothy Hunt, Sr.	\$ 23,203.95	\$ 439.50		\$ 23,643.45
10. Rex Jackson	\$ 68,306.77	\$ 734.16		\$ 69,040.93
11. Delmar Kirksey	\$ 49,765.27			\$ 49,765.27
12. Kurt Lindhorst	\$ 1,944.92			\$ 1,944.92
13. Gene Matz	\$ 21,103.83			\$ 21,103.83
14. David Mensinger	\$ 34,674.49	\$ 7,746.65		\$ 42,421.14
15. Dennis Meyers	\$ 273.80	\$ 2,089.00		\$ 2,362.80
16. David Pecoraro	\$ 35,961.29	\$ 2,641.02		\$ 38,602.31
17. Jeffery Pomeroy	\$ 44,440.42			\$ 44,440.42
18. Roger Reitz	\$ 22,969.11	\$ 1,592.25		\$ 24,561.36
19. Randall Roach	\$ 3,868.48			\$ 3,868.48
20. Douglas Rouse	\$ 7,186.42	\$ 4,938.91		\$ 12,125.33
21. David Sinner	\$ 27,453.06	\$ 7,641.04		\$ 35,094.10
22. Norman Smith	\$ 7,265.76			\$ 7,265.76
23. Jeff Steinke	\$ 2,482.75	\$ 8,272.05		\$ 10,754.80
24. Bill Taylor	\$ 10,950.51	\$ 2,135.68		\$ 13,086.19
25. Robert Taylor	\$ 9,411.20			\$ 9,411.20
26. Jerry Thompson	\$ 1,430.14	\$ 5,160.48	\$ 59,000.00	\$ 65,590.62
27. Keith Vander Ploeg	\$ 4,037.89	\$ 11,462.75		\$ 15,500.64
28. James Whitehead	\$ 24,265.83	\$ 7,301.25		\$ 31,567.08
29. Meryl Ray Zion	\$ 168,655.61	\$ 12,524.44		\$181,180.05
TOTALS	\$ 789,918.93	\$ 84,042.94	\$ 59,000.00	\$932,961.87

Dated, Washington, D.C. April 11, 2001